

Ng Kon Yu v Sakim bin Saiking & Ors

HIGH COURT (SANDAKAN) — ORIGINATING SUMMONS NO S24-25 OF
1999
RICHARD MALANJUM J
3 JULY 2001

Land Law — *Possession — Recovery of — Order for recovery of possession — Defendants cultivated land long before plaintiff was granted title — Whether defendants mere squatters simpliciter — Whether sufficient notice given before grant of title to plaintiff — Whether defendants acquired native customary rights over land — Whether plaintiff's title indefeasible — Whether triable issues raised — Rules of the High Court 1980 O 89*

The plaintiff was the registered owner of three pieces of land located in Sandakan, Sabah ('the land') since 1 September 1998. The defendants were in occupation of the land, having built their houses and cultivated crops thereon. According to the plaintiff, he had purchased the land from the vendors and subsequent to the purchase, the plaintiff discovered that there were trespassers on the land. This was the plaintiff's application under O 89 of the Rules of the High Court 1980 ('the RHC') to recover possession of the land. The defendants' version was that they were not trespassers as they and/or their parents had entered the land in 1976 under a scheme sponsored by the state government, wherein they were allotted lots on the land. The defendants stated that they had thereafter submitted their land applications for the lots but the defendants discovered in 1988, that the lots had been alienated to the vendors. The defendants sought the assistance of politicians but nothing transpired thereafter. As such, the defendants' case was that summary judgment should not be given to the plaintiff pursuant to O 89 of the RHC as there were triable issues requiring a proper trial. According to the Assistant Collector of Land Revenue ('ACLR'), before the land applications by the vendors were processed, notices under s 13 of the Sabah Land Ordinance ('the Ordinance') were posted on the notice board at his office. The purpose of the notice was to enable a claimant to native customary rights in the land to send in a statement of his claim. There were no claims received in this case and the land applications were accordingly processed. The ACLR admitted however that there was a possibility that since the land was located in a remote area, the defendants would not have had the chance to see the notices. One of the procedures to be complied with was the inspection of the land concerned. In a report made by the land inspector, he stated that the vendors cultivated the land and that there were no claims for native customary rights.

Held, dismissing the application:

- (1) Where there were triable issues raised by the defendant in an application under O 89 of the RHC, the courts usually would not grant summary judgment to an applicant because the issues should be tried by viva voce evidence. Hence, O 89 of the RHC

- A was appropriate in a plain and obvious case such as where a defendant was a squatter simpliciter (see p 150H–I).
- (2) There was no dispute that the defendants or their parents were on the land as early as 1976 and that the land applications were made as early as 1976. Although the ACLR was aware that the defendants had entered the land and were cultivating it, no protest was issued against the defendants in respect of the occupation of the land. In fact, the last letter from the office of the ACLR to the defendants was to inform the latter that their applications would be brought to a meeting and that the defendants would be informed of the result in due course. In contrast, the vendors only made the land applications in 1987 and 1990. These facts demanded an explanation from the office of the ACLR. Furthermore, from the tenor of the letters written by the Natural Resources Department and the office of the ACLR, there was positive indication that the defendants’ applications would be processed. There was no caution given that approval was not guaranteed or that the defendants’ presence on the land would be of any advantage. The defendants did not enter the land devoid of any reason. They did so with a view to apply for them and in fact did apply. Accordingly, the defendants were not squatters simpliciter and this was therefore not a plain and obvious case to invoke O 89 of the RHC (see pp 156F–G, 157C–G).
- E (3) There was nothing in the Land Rules 1930 (‘the Rules’) to indicate that it was sufficient for notices made under s 13 of the Ordinance to be posted on the notice board at the office of the ACLR. Mere performance of the ritual of putting up the notices would not rectify the shortcomings in the handling of the present matter and should not cause the obliteration of all rights that might have been acquired by the defendants. Furthermore, it was obvious that the land inspector failed to do his job as required since he had reported that the land was cultivated by the vendors when the land was in fact cultivated by the defendants (see pp 157H–158D).
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- G (4) There was no doubt that the plaintiff was now the registered owner of the land. There was however, no averment that he had purchased the same in good faith and in complete ignorance of the conditions therein. Unlike the National Land Code 1965 or the Sarawak Land Code, there was no provision for indefeasibility of title under the Ordinance. On the assumption that the approvals for the vendors’ land applications were given contrary to law in that the procedures and requirements were not properly complied with, it was necessary to consider whether the alienation of the land to the vendors was in order and whether a stand should be taken that once a title deed had been issued, nothing could be done to undo any error. A further question to be considered was whether the vendors had derived good title by mere registration of ownership that could be passed on to the plaintiff. These were
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triable issues requiring further enquiry and as such, it was difficult to say that this was a plain and simple case that justified summary judgment under O 89 of the RHC (see pp 158F–I, 159B).

- (5) Even if the court was wrong in so determining, it would be difficult to say that the defendants were trespassers or squatters simpliciter. It was arguable that by the defendants' continuous and unimpeded presence on the land, the authorities would have clothed the defendants with the sense of being allowed or licensed to be on the land. In view thereof, the matter should not be cast aside in favour of a summary order as prayed for by the plaintiff (see p 159E–G).

[Bahasa Malaysia summary]

Plaintif adalah pemilik berdaftar tiga bidang tanah yang terletak di Sandakan, Sabah ('tanah tersebut') sejak 1 September 1998. Defendan-defendan adalah penetap tanah tersebut, setelah membina rumah mereka dan bercucuk tanam di situ. Menurut plaintif, beliau telah membeli tanah tersebut daripada penjual-penjual dan berikutan pembelian tersebut, plaintif mendapati bahawa terdapat penceroboh-penceroboh di atas tanah tersebut. Ini adalah permohonan plaintif di bawah A 89 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT') untuk mendapat semula milikan tanah tersebut. Versi defendan-defendan adalah bahawa mereka bukan penceroboh-penceroboh tersebut kerana mereka dan/atau ibubapa mereka telah menetap di atas tanah tersebut pada tahun 1976 di bawah satu skima yang dibiayai oleh kerajaan negeri, di mana mereka diperuntukkan lot-lot di atas tanah tersebut. Defendan-defendan menyatakan bahawa mereka kemudian telah mengemukakan permohonan tanah mereka untuk lot-lot tersebut tetapi defendan-defendan mendapati pada tahun 1988, bahawa lot-lot tersebut telah diberimilik kepada penjual-penjual. Defendan-defendan memohon bantuan ahli-ahli politik tetapi tiada apa-apa yang berlaku kemudiannya. Oleh itu, kes defendan-defendan adalah penghakiman terus tidak sepatutnya diberikan kepada plaintif menurut A 89 KMT kerana terdapat persoalan-persoalan yang boleh dibicarakan yang memerlukan satu perbicaraan yang sebenar. Menurut Penolong Pemungut Hasil Tanah ('PPHT'), sebelum permohonan-permohonan tanah tersebut oleh penjual-penjual diproses, notis-notis di bawah s 13 Ordinan Tanah Sabah ('Ordinan tersebut') telah ditampalkan pada papan notis di pejabat beliau. Tujuan notis tersebut adalah untuk membolehkan pihak yang menuntut terhadap hak-hak adat anak watan dalam tanah tersebut untuk menghantar satu pernyataan tuntutan beliau. Tiada tuntutan diterima dalam kes ini dan permohonan-permohonan tanah tersebut dengan sewajarnya telah diproses. PPHT telah mengakui bagaimanapun bahawa terdapat kemungkinan bahawa memandangkan tanah tersebut terletak dalam kawasan pedalaman, defendan-defendan mungkin tidak mempunyai peluang melihat notis-

- A notis tersebut. Salah satu daripada prosedur yang perlu dipatuhi adalah pemeriksaan ke atas tanah tersebut. Di dalam satu laporan yang telah dibuat oleh pegawai pemeriksa tanah, beliau menyatakan bahawa penjual-penjual tersebut telah mengusahakan tanah tersebut dan bahawa tiada tuntutan untuk hak-hak adat anak watan.
- B **Diputuskan**, menolak permohonan tersebut:
- C (1) Di mana terdapat persoalan-persoalan yang perlu dibicarakan oleh defendan di dalam satu permohonan di bawah A 89 KMT, mahkamah-mahkamah selalunya tidak memberikan penghakiman terus kepada seorang pemohon kerana persoalan-persoalan tersebut sepatutnya dibicarakan melalui keterangan viva voce. Justeru itu, A 89 KMT adalah sesuai dalam kes yang biasa dan jelas seperti di mana seorang defendan adalah seorang penduduk setingan simpliciter (lihat ms 150H-I).
- D (2) Tiada pertikaian bahawa defendan-defendan atau ibubapa mereka berada di atas tanah tersebut seawal 1976 dan bahawa permohonan-permohonan tanah tersebut dibuat seawal 1976. Walaupun PPHT menyedari bahawa defendan-defendan telah menetap di atas tanah-tanah tersebut dan mengusahakannya, tiada bantahan telah dikeluarkan terhadap defendan-defendan berhubung penetapan di atas tanah tersebut. Lagipun, surat terakhir daripada pejabat PPHT kepada defendan-defendan adalah untuk memaklumkan kepada mereka bahawa permohonan-permohonan mereka akan dibentangkan dalam mesyuarat dan bahawa defendan-defendan akan dimaklumkan tentang keputusannya kelak. Sebaliknya, penjual-penjual hanya membuat permohonan-permohonan tanah tersebut pada tahun 1987 dan 1990. Fakta-fakta begini memerlukan satu penjelasan daripada pejabat PPHT. Tambahan pula, daripada maksud surat-surat yang ditulis oleh Jabatan Sumber Asli dan pejabat PPHT, terdapat tanda positif bahawa permohonan-permohonan defendan-defendan akan diproses. Tiada amaran diberikan bahawa kelulusan tidak dijamin atau bahawa kehadiran defendan-defendan di atas tanah tersebut merupakan satu kelebihan. Defendan-defendan tidak menetap di atas tanah tersebut dengan tidak mempunyai apa-apa sebab. Mereka berbuat demikian dengan tujuan untuk memohon bagi diri mereka dan telahpun memohon. Sewajarnya, defendan-defendan bukan penduduk-penduduk setingan simpliciter dan oleh itu ini bukan satu kes yang biasa dan jelas untuk menggunakan A 89 KMT (lihat ms 156F-G, 157C-G).
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- I (3) Tiada apa-apa dalam Kaedah-Kaedah Tanah 1930 ('Kaedah tersebut') untuk menandakan bahawa adalah mencukupi bahawa notis-notis yang dibuat di bawah s 13 Ordinan tersebut ditampalkan pada papan tanda di pejabat PPHT. Dengan hanya pelaksanaan amalan menampalkan notis-notis tersebut tidak

membetulkan kelemahan-kelemahan dalam mengendalikan perkara ini dan tidak sepatutnya menyebabkan penghapusan semua hak yang mungkin telah diperolehi oleh defendan-defendan. Tambahan pula, adalah jelas bahawa pegawai pemeriksa tanah telah gagal untuk menjalankan tugasnya sebagaimana yang dikehendaki memandangkan beliau telah melaporkan bahawa tanah tersebut telah diusahakan oleh penjual-penjual di mana tanah tersebut pada hakikatnya telah diusahakan oleh defendan-defendan (lihat ms 157H–158D).

- (4) Tiada keraguan bahawa plaintif sekarang adalah pemilik berdaftar tanah tersebut. Namun begitu tidak terdapat apa-apa penegasan bahawa beliau telah membeli yang sama dengan niat baik dan tidak tahu langsung tentang syarat-syarat tersebut. Tidak seperti Kanun Tanah Negara 1965 atau Kanun Tanah Sarawak, tiada peruntukan untuk hakmilik yang tidak boleh disangkal di bawah Ordinan tersebut. Dengan andaian bahawa kelulusan untuk permohonan-permohonan tanah penjual-penjual telah diberikan bertentangan dengan undang-undang di mana prosedur-prosedur dan keperluan-keperluan tidak dipatuhi dengan betul, adalah perlu untuk mempertimbangkan sama ada pemberimilikan tanah tersebut kepada penjual-penjual adalah teratur dan sama ada pendirian dibuat di mana setelah satu suratikatan hakmilik dikeluarkan, tiada apa-apa yang boleh dibuat untuk membetulkan apa-apa kesilapan. Soalan seterusnya untuk dipertimbangkan adalah sama ada penjual-penjual tersebut telah mendapat hakmilik yang baik dengan hanya membuat pendaftaran pemilikan yang boleh dipindahkan kepada plaintif. Wujud persoalan-persoalan yang perlu dibicarakan yang memerlukan siasatan yang lebih lanjut dan oleh demikian, adalah sukar untuk mengatakan bahawa ini adalah satu kes yang biasa dan jelas untuk menjustifikasikan penghakiman terus di bawah A 89 KMT (lihat ms 158F–I, 159B).
- (5) Walaupun jika mahkamah telah khilaf dalam membuat penentuan sebegini, adalah amat sukar untuk mengatakan bahawa defendan-defendan adalah penceroboh-penceroboh atau penduduk-penduduk setingan simpliciter. Ia boleh diujahkan bahawa dengan kehadiran berterusan dan tidak terhalang defendan-defendan di atas tanah tersebut, pihak-pihak berkuasa boleh melindungi defendan-defendan dengan maksud membenarkan atau memberikan lesen untuk menetap di atas tanah tersebut. Dengan tujuan sedemikian, perkara tersebut sepatutnya tidak diketepikan bagi memihak kepada satu perintah terus sebagaimana yang dipohon oleh plaintif (lihat ms 159E–G).]

Notes

For cases on recovery of possession, see 8(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2952–2956.

A Cases referred to

Borneo Housing Mortgage Finance Bhd v Times Engineering Bhd [1996] 2 MLJ 12 (refd)

Norimah bte Mohamed & Ors v Bukit Lenang Development Sdn Bhd and other appeals [2000] 3 MLJ 129 (refd)

B *Salim bin Ismail & Lain-Lain kwn Lebbey Sdn Bhd (No 2)* [1997] 2 MLJ 4 (refd)

Zaibar Auto (M) Sdn Bhd, & Anor v Shell Malaysia Trading Sdn Bhd [1996] 2 MLJ 221 (refd)

C Legislation referred to

Rules of the High Court 1980 O 38 r 13(1), O 89, rr 1, 3(b)
Sabah Land Ordinance s 13

Majnah Abdillah (Chin Lau Wong & Foo) for the plaintiff.

Maijol Mahap (Mahap Jelani & Co) for the defendants.

D Richard Malanjum J:*Introduction*

Before me is an application ('encl 3') by the plaintiff made under O 89 of the Rules of the High Court 1980 ('the Rules'). The order sought for is that the plaintiff should recover possession of the landed properties known as CL 085327180 (applied under PT 90080866) ('the first piece'), CL 085321633 (applied under PT 87081237) ('the second piece') and CL 085327199 (applied under PT 90080863) ('the third piece') (collectively 'said lands') all situated at Luangmanis, Labuk Sugut, Sandakan, Sabah, Malaysia. The reason for the plaintiff in asking for such an order is that he is entitled to possession, being the registered owner and that the persons in occupation are there without licence or consent.

The defendants are disputing the claim of the plaintiff. Accordingly, both sides have filed several affidavits. For the plaintiff, there is the first affidavit in support affirmed by the plaintiff on 6 April 1999 (plaintiff's first affidavit). The defendants filed their respective affidavits in opposition and all affirmed them on 18 June 1999. For the first defendant, it is encl 14 (first defendant's affidavit), the second defendant it is encl 17 (second defendant's affidavit), the third defendant it is encl 20 (third defendant's affidavit), the fourth defendant it is encl 23 (fourth defendant's affidavit) and the fifth defendant it is encl 26 (fifth defendant's affidavit).

There is also the affidavit in reply from the plaintiff affirmed on 25 April 2000 (encl 41) (plaintiff's affidavit in reply).

In the course of the hearing of this case, the plaintiff made an application (encl 35) under O 38 r 13(1) of the Rules for an order that the Assistant Collector of Land Revenue ('ACLR') Beluran be compelled to come to court to produce certain documents. That application was heard and the order granted when the learned counsel for the defendants offered no objection. Thus, in this case, there was in fact a short hearing of

evidence from the ACLR Beluran and the admission of documents as exhibits. A

The undisputed facts

It is not in doubt that presently the ownership of the said lands is now registered under the name of the plaintiff since 1 September 1998. It is also not in dispute that the defendants are in fact in occupation of the said lands, and having built their houses and also cultivated the same with both short and long terms crops. But the parties have differing versions on what led them to the same lands. B

The version of the plaintiff C

According to the plaintiff, he became the owner of the said lands in the sequence as follows:

On 20 June 1995, the plaintiff purchased two parcels of the said lands from one Leong Yuk Fong. The plaintiff purchased the last piece from one Tsen Kin Wai. For the purpose of this judgment these persons from whom the plaintiff bought the said lands would be referred to as the vendors. The first, second and third pieces measure 13.25 acres, 12.18 acres and 12.62 acres respectively. On the same day of purchase, the respective vendors made the plaintiff their attorney. D

The plaintiff disclosed that when he purchased the first piece it was only on approval stage with the title deed yet to be issued. As for the second piece, it was at the draft title stage. But the third piece was only at an application stage bearing land application No PT 90080863. On 12 September 1996, the registered title for the second piece was issued while for the first and third pieces, the respective title deeds were only issued on 16 November 1996. E F

It is the story of the plaintiff that after he had purchased the said lands, he discovered that there were trespassers on them. Going by his account, the first defendant is occupying the first piece, while the second and third defendants are occupying the third piece. As for the second piece, the fourth and the fifth defendants occupy it. The plaintiff alleged that besides cultivation of crops, wooden houses have also been constructed on the said lands. G

In view of the presence of the defendants, the plaintiff said that he caused notices to quit to be issued by his solicitors to them. But that did not bear any result. Hence, this present application was made. H

The version of the defendants

Although each of the defendants filed an affidavit to oppose the application overall, their line of objection is similar. For convenience, I should consider their respective affidavits. But before doing so, I must record here that I find it quite appalling that there appears to be very little care taken in the preparation of these affidavits, in that four out of five of them make reference only to the third piece of the said lands. In fact, if going by these I

- A affidavits, there seems to be either no denial in the allegation of trespass into the first piece, or that there was no entry at all to begin with. And there is an obvious conflict between the assertion of the second defendant and that of the third defendant pertaining to which piece they have entered, although they said that they are living together. Be that as it may, I think I should not penalize these defendants who obviously relied on the solicitors for their professional services. I take it, therefore, that the assertion of the plaintiff as to who occupies which piece of the said lands is correct. And before going to the respective affidavits, it is common ground of the deponents that their land applications were made as a group and the leaders of the group were Kumin bin Ranggagan and Nicholas Bungalun. It was not, therefore, surprising that the letters to the relevant authorities were signed by either of these two persons.

- Now, the first defendant admits that he is in occupation of the third piece of the said lands. I think here there is a mistake as the plaintiff said that the first defendant is occupying the first piece. Anyway, the first defendant maintains that he is not a trespasser in that he entered therein by virtue of his wife, Radinah Akun, being one of the applicants/participants in the state government sponsored Small Holders Scheme of Luangmanis, Beluran, Labuk, Sandakan, Sabah. According to the first defendant, his wife was allotted a lot known as Lot 34, Block 2, Phase 2, measuring 14.94 acres. One Sampai Gurotob made the allotment in 1988. Upon the allotment, the first defendant alleged that he and his wife entered the area and started planting short term and long term agricultural crops therein. It was also averred that his wife submitted her land application for the lot in 1988. However, in the same year, the first defendant said that they heard that the said lot was alienated to another. They were angry but the furthest they went was to see a few politicians for help with no result.

- F As regards this application, it is the stand of the first defendant that there are questions to be tried and that the summary application for an order to evict them is inappropriate. And the reasons given are several, inter alia, that in view of their entry into the said lot, applied for it when it was still uncommitted and available, and having cultivated it and raised their family, he and his wife should be entitled to claim for customary rights over the said lot. And even if there is no customary right acquired, the first defendant said that they are licensees as they entered the said lot with the consent of the government and it was thus a lawful entry. And finally, the first defendant said that he has been advised that there was a failure on the part of the plaintiff to comply with r 3(b) of O 89 of the Rules.

- H As for the second defendant, it is his stand that he did not trespass into the second land. Here again, there appears to have been a mistake as the plaintiff said that this defendant occupies the third piece and not the second piece. Anyway, this defendant said that he is the cousin of the third defendant and lives with him. And he said that he has been advised that the third defendant has raised triable issues on the claim of the plaintiff.

- I It is the averment of the third defendant that he came into the said third piece because he is the son of one Sampai Gurotob, who was one of the

many applicants led by the said Kumin Rancangan and Nicholas Bundalun in applying for lots under the Small Holders Scheme. According to the third defendant, his father had the area allotted to him measuring 14.89 acres and later became known as Lot 35, Block 2, Phase 1 since 1976. It was on that same year that his father entered the said lot to plant crops and built a house for his family.

As regards the land application made, the third defendant said that his father and the other applicants were encouraged to apply for the lots by the government at that time. And as such, formal applications for the lots were made in late 1980 or early 1981. In 1985, his father passed the said lot to him and hence the third defendant continued to live there. But in 1988, he heard that the said lot was alienated to another person. And as was done by the first defendant, the third defendant also went to see some politicians for help. Nothing came out of those meetings.

In resisting the application of the plaintiff, the third defendant also relied on the same grounds as canvassed by the first defendant. And he went further by saying that the vendor of the said piece only applied for it in 1990 and obtained the title deed in 1996, while his father was already in occupation of the same at the time when it was not yet committed to anyone.

I pause here to note that some portions of what the third defendant has said are hearsay and of no evidential value.

The fourth defendant in her affidavit denied that she had encroached or trespassed into the third piece. There appears a mistake here as well in that the fourth defendant could have meant the second piece. While the third defendant was only relating to what his father did in connection with the piece he has been occupying, this fourth defendant said that she was amongst the many applicants for the lots under the Small Holders Scheme. According to her, she and the other applicants entered their respective lots in 1976. Her lot measured an area of 14.76 acres. Upon entering the said piece, she said that she and her husband (the fifth defendant herein) began cultivating various crops therein. Having met the relevant authorities pertaining to their land applications, this defendant said that their impression was that they could apply the respective lots, and in fact they were encouraged by the Chief Minister's Department through the Natural Resources Department to do so. It was only on 1988 that they heard that the lots were being alienated to others. That upset them and meetings with some politicians did not help.

As with the other defendants, this defendant also raised the common reasons for resisting the claim of the plaintiff.

Finally, for the fifth defendant, he affirmed that he is the husband of the fourth defendant, and thus his occupation of the third piece (the second piece perhaps) is lawful for the reasons given by his wife in her affidavit.

In other words, the thrust of the case of these defendants is that no summary order should be given to the plaintiff pursuant to O 89 of the Rules as there are triable issues raised requiring a trial proper. And the issues according to them are: (i) whether they have acquired native

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- A customary rights based on the fact that they have been in occupation of the respective pieces long before the applications of the former owners/vendors of the same; (ii) whether in the circumstances of this case, they should be given the status of licensees since they were encouraged by the government to enter and cultivate their respective areas; and (iii) whether any relief should be given to the plaintiff since there is a failure to comply with the provision of full disclosure as required under O 89 of the Rules.
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The version of the ACLR

- C The ACLR, En Benedict Asmat (PW1), opted not to affirm any affidavit and so he was subpoenaed to attend the hearing to produce some documents and to clarify some of the matters raised in the respective affidavits filed therein.

- D He began by saying that he was the Assistant District Officer cum the ACLR of Beluran. And he went on to say that in compliance with the court order, he had brought a certified copy of the plan of the Sungai Lokan Forest Reserve, wherein the Luangmanis Small Holder Scheme II is found and delineated in red. With no objection from the learned counsel for the defendants, that certified copy was tendered, admitted and marked as exh P1.

- E This witness also said that the said lands had been identified in exh P1 and thus delineated in yellow. And he confirmed that the area in yellow was once part of the Small Holders Scheme. However, when the Telupid-Sandakan Road was constructed, the area in yellow was excised and reverted into state land. Unfortunately, this witness was unable to remember when that happened. But he confirmed that the area in yellow had been alienated and with titles.

- F As regards the process in the issuance of the title deeds for the said lands, PW1 said that notices under s 13 of the Sabah Land Ordinance ('the Ordinance') were given and exhibited to enable anyone to submit any objection. As there was no objection received in this case the land applications were then processed.

- G Under cross-examination PW1 said that he was not sure where those notices were exhibited. But as far as he knew, notices were pasted on the notice board of the office. And he said that there was a possibility that due the said lands being in the remote area, the settlers therein would not have had the chance to see the notices. However, PW1 confirmed that prior to the land applications of the vendors, there were earlier land applications by one Kumin bin Ranggon. He was unable to say if that Kumin was the group leader of the defendants. But PW1 said that he had the list of participants that applied with Kumin in 1976.
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- I When re-examined, PW1 said that the land applications of Kumin were not approved. But he also said that it was difficult to say, since when Kumin and his group applied for the area, the surveyor said that the area was under the Small Holders Scheme. And according to PW1 they appealed to the Natural Resources Department for approval. The instruction from the

department was that they should be listed in the list of small holders if they qualified. However, when the list came out, PW1 opined that they might not have been included.

PW1 also explained at length the procedure on the issuance of a notice under s 13 of the Ordinance and the need for an area applied for to be inspected by a land inspector, and subsequently to make a report. In this case, PW1 said that Roger J Angalong carried out inspection on 22 October 1994 for PT 90080864–0866 and PT 90080861–0863, and thereafter prepared two reports in respect of two pieces of the said lands. And in those reports, it was stated that the applicants, referring to the vendors, cultivated those lands, and that there was no claim for native customary rights.

When PW1 was further asked, he said that he was not sure who did the cultivation. And he was also not sure whether the land inspector did go to the area or he just depended on the information supplied by the applicants/vendors. In answer to a further question, PW1 said that the land inspector would go for inspection when told to do so by the ACLR, and that occurred when there appeared to be a problem with a particular land application. In this case, PW1 said that on 2 August 1994, the Land Utilization Committee ('the committee') directed the area to be inspected. That is in respect of two of the land applications. In the other application, PT 87081237, he said that the committee supported the application without any instruction to inspect.

The issues

The primary issue is whether there is any merit to any of the assertions by the defendants, and if so what the consequential order to make should be. To recap, the points raised as being triable issues are:

- (1) whether the defendants, by virtue of them being in the said lands allegedly with the tacit approval of the relevant authorities, have acquired native customary rights over the same;
- (2) alternatively, whether they are licensees either on the basis of their allegation of tacit approval for their entry into the said lands by the relevant authorities, or due to the passive reaction of the office of the ACLR Beluran and/or the state government even after having being informed or having known, directly or indirectly, of their entry into the said lands; and
- (3) whether the failure of the plaintiff to comply with the requirement of full disclosure should deprive him of the remedy under O 89 of the Rules.

But before going into the specific issues, perhaps I should examine the scope of O 89 of the Rules in term of its application. Where it is found that there are triable issues raised by a defendant in an application under this order, the courts usually will not grant summary judgment to an applicant. And the reason is that in such a case, the issues should be tried by way of *viva voce* evidence. Hence, O 89 of the Rules is appropriate in a plain and obvious case such as where a defendant is a squatter simpliciter.

A In the case of *Norimah bte Mohamed & Ors v Bukit Lenang Development Sdn Bhd and other appeals* [2000] 3 MLJ 129, the Court of Appeal was clear on the application of this order when it said this at p 133:

B After carefully considering the arguments addressed to us by counsel, we are satisfied that there is much force in the submissions advanced on behalf of the appellants. In our judgment, the issues identified by En Karpal Singh and En Abdul Razak constitute serious triable issues that are wholly inappropriate for resolution under the summary jurisdiction which O 89 confers.

C The position in the instant appeals is adequately covered by high authority. We refer to the decision of the Supreme Court in *Bohari bin Taib & Ors v Pengarah Tanah Galian Selangor* [1991] 1 MLJ 343, where it was held the summary procedure under O 89 is inapplicable to a case in which arguable issues have been raised. It is sufficient for us to cite Mohd Azmi SCJ in that case at p 346:

D ‘In our view, the appellants in this particular case have sufficiently shown by affidavit evidence that they have an arguable case in that they and some, not all, of the farmers have occupied the land for three years under licence and thereafter have remained in occupation with the continued consent of the state government by virtue of the 1980 alienation already approved prior to the TOLs. The learned State Legal Adviser, En Hishamuddin for the respondent, pointed out that the TOLs and therefore consent were given only up to 1983. After that no TOL was issued, thus indicating absence of consent. In our view, the alleged continued consent of the state government to their occupation notwithstanding the expiry of the TOLs, is one of the serious issues to be tried. The case for the appellants is that they were already in occupation with consent prior to 1981 and the grant of TOLs from 1981 to 1983 is merely part of the chain of events supporting the existence of an approval of alienation of the lands to them by the state authority under s 42 of the National Land Code 1965, and pending issue of titles under s 77(2) they are entitled to remain on the land not as squatters but as of right. The approval of the state authority as exhibited by the appellants, -would appear to have been made on 4 September 1980, according to the letter of the collector of Sabak Bernam dated 25 October. The opening paragraph of the letter at p 95 of the appeal records reads:

G “Merujuk kepada perkara tersebut di atas, dimaklumkan bahawa permohonan tuan/puan ke atas tanah di rancangan tersebut di atas telah diluluskan oleh Majlis Mesyuarat Kerajaan Negeri pada 4 September 1980.”

H We are therefore of the opinion that there are issues to be tried in this case which are not suitable to be decided by affidavit evidence. We accordingly agree that this case should not be dealt with summarily under O 89.’

Mohamed Azmi SCJ then went on to state at p 346, para B–D:

I ‘In our opinion, for the purpose of summary procedure, a distinction should be made between squatters simpliciter who have no rights whatsoever, and occupiers with licence or consent, and as well as tenants and licensees holding over. It may be impossible to establish the existence of any triable issue in the case of bare squatters, but the position of tenants and licensees holding over, or persons occupying with implied or expressed consent of the owner may be different. On the facts, we hold

that there are triable issues on the absence of either licence or consent as alleged by the respondent. Evidence viva voce is required not only on the alleged consent of the respondent to the appellants occupation rendering their entry unlawful, but also on whether the approval of the state authority to the alienation of the lands to the appellants and the other occupiers had been given in 1980 under s 42 of the National Land Code 1965, per Gopal Sri Ram at p 133.'

In the earlier case of *Zaibar Auto (M) Sdn Bhd, & Anor v Shell Malaysia Trading Sdn Bhd* [1996] 2 MLJ 221, his Lordship Gopal Sri Ram at p 216 said this:

In order to appreciate the arguments advanced in support of the appeal, it is necessary to hearken to the words of r 1 of O 89 which is in the following terms:

1 Where a person claims possession of land which he alleges is occupied solely by a person or persons (not being a tenant or tenants holding over after the termination of the tenancy) who entered into or remained in occupation without his licence or consent or that of any predecessor in title of his, the proceedings may be brought by originating summons in accordance with the provisions of this order.

The rule has always been read, as it ought to be read, as applying to squatters, pure and simple. It does not apply to tenants who are holding over. It does not apply to one who enters upon land or who remains in occupation with the consent of the applicant under the Order or any predecessor in title of such an applicant. It does not apply to persons who are in occupation under a legitimate expectation of receiving, from the State Authority, issue documents of title to the portions they occupy. See, *Bohari bin Taib & Ors v Pengarah Tanah Galian* [1991] 1 MLJ 343.

Bearing in mind the scope upon which O 89 of the Rules has been given by our courts, I shall now proceed to examine the points raised on behalf of the defendants in resisting the present application of the plaintiff.

(a) Issue (i)

The Sabah Land Ordinance (Cap 68) ('the Ordinance') recognizes the existence of the right of the natives of Sabah as defined to claim native customary rights over unalienated land in Sabah. That is why before any land application is processed there is a mandatory requirement that a notice be issued so as to notify any native to come forward to present his or her claim of native customary right over the land applied. And in the event that there is a claim and it is determined to be a valid claim, such right will be finalized either with the granting of title deed to the native claimant or that he or she will be paid monetary compensation in lieu. But an appearance of a land application is not the only occasion that can trigger the need for the natives to stake their claim of native customary right. The Ordinance also provides a provision whereby the Tuan Yang Terutama may gazette an area as settlement and those who wish to make claims for native customary right may do so within a specified period. Thereafter, the area left unclaimed will be categorized as state land and no further claim for native customary right will be entertained.

A It is also interesting to note that the Ordinance, by way of Rules made thereunder, provides a clear instruction on the mode of service of notices. This is perhaps to ensure that the targets of the same know the notices.

B For convenience, it is perhaps appropriate to reproduce some of the relevant provisions of the Ordinance and the Rules made thereunder. Under the Ordinance they are as follows:

12 Application for State land

Applications for State land may be made to the Director, or to the collector, and shall be substantially in the form of Schedule III.

C 13 Enquiry as to native rights

Upon the receipt of any application for unalienated country land it shall be the duty of the Collector to publish a notice calling upon any claimant to native customary rights in such land who is not yet in possession of a registered documentary title to make or send in a statement of his claim within a date to be specified in the notice. If no claim is made the land shall be dealt with as if no such rights existed.

D

14 Collector to decide claims

Claims to native customary rights shall be taken down in writing by the headman or by the Collector, and shall be decided by the Collector.

E 15 Definition of customary rights

Native customary rights shall be held to be —

- F**
- (a) land possessed by customary tenure;
 - (b) land planted with fruit trees, when the number of fruit trees amounts to fifty and upwards to each hectare;
 - (c) isolated fruit trees, and sago, rotan, or other plants of economic value, that the claimant can prove to the satisfaction of the collector were planted or unkempt and regularly enjoyed by him as his personal property;
 - (d) grazing land that the claimant agrees to keep stocked with a sufficient number of cattle or horses to keep down the undergrowth;
 - (e) land that has been cultivated or built on within three years;
 - (f) burial grounds or shrines;
 - (g) usual rights of way for men or animals from rivers, roads, or houses to any or all of the above.
- G**

16 Procedure when rights established

- H**
- (1) Native customary rights established under s 15 shall be dealt with either by money compensation or by a grant of the land to the claimant and in the latter case a title shall be issued under Part IV.
 - (2) Where the Collector decides that native customary rights established under s 15 shall be dealt with by money compensation, the affected land together with all buildings, erections and crops thereon shall vest in the Government free from all encumbrances and shall be deemed to have been surrendered by the lawful claimant thereof upon such decision being made.
- I**

65 Customary tenure A

‘Customary tenure’ means the lawful possession of land by natives either by continuous occupation or cultivation for three or more consecutive years or by title under this Part or under the Poll Tax Ordinance * or Part IV of the Land Ordinance 1913.

80 Proclamation of settlement. B

The Yang di Pertua Negeri may by notification in the Gazette* and by notices locally promulgated proclaim any area or district in Sabah for settlement under this Part. See GN 705/1960,360/1963.

81 Native claims to be sent to Collector. C

It shall be obligatory on all natives claiming land within the district or area proclaimed who do not already hold a documentary title therefor, or who claim other native customary rights therein, to state their claims to the collector or his agent either verbally or in writing within the period stated in the notification, which period shall not be less than four months from the date thereof.

82 Collector to register and decide claims. D

The collector shall enter in a register all claims submitted within the period assigned in the notification and being guided by the conditions laid down in the definitions of customary tenure and of native customary rights in this Ordinance he shall record his decision as to the ownership of the land and the claims to other native customary rights.

83 Compensation or resumption by Government. E

The collector may if so directed order that any land, the claim to which is admitted by him under the preceding sections, shall be resumed by Government; and in such case he shall proceed in the manner provided in the Land Acquisition Ordinance, to determine the amount of compensation to be paid:

Provided that no land held under a documentary title shall be liable to resumption under this section.

84 Unclaimed land to become State land. F

All lands which has not been claimed or the claim to •which has been rejected shall become absolutely the property of Government:

Provided that if a claim has been rejected by the collector, the claimant may lodge an appeal to the Director in accordance with the provisions of s 41.

And under the Land Rules GN 505 of 1930, these are relevant:

Application for state land: G

2(1) Every application for State land shall be in writing and shall contain a sketch showing approximately the situation of the land applied for:

Provided that applications for titles under Part IV may be made orally to the Collector.

(2) A register of all applications for land shall be kept in each district by the collector in the form set out in Schedule A. H

(3) An application shall not be accepted unless the following fees are paid — I

- A** (a) in the case of an application for land to be held under Part II or Part III, at least one quarter of the survey fees estimated to be payable on the area of land for which application is made; and in the case of an application for land to be held under Part IV at least one-sixth of such fees;
- B** (b) in the case of an application for land to be held under Part II or Part III on which premium is payable, at least one-quarter of the premium assessed by the Collector.
- (4) No payments made under sub-r (3) shall confer any right whatsoever to the land applied for and acceptance of any such payment shall not constitute any undertaking that the application will be approved.
- C** (5) The collector may cancel any application if the applicant shall not have signed the title within six months of being called on to do so, or shall have left the district without leaving an address or appointing an agent to act on his behalf, or shall not have accepted within three months of their being communicated to him, any special conditions to be imposed.
- (6) If the application is refused, any sums paid under sub-r (3) shall be refunded to the applicant.
- D** (7) If the application is withdrawn, the applicant shall be liable for all expenses incurred by Government in connection with the application, and with the survey, if any, of the land applied for.
- (8) Any balance of the sums paid by the applicant under sub-r (3) which may still remain after deductions have been made in accordance with sub-r (7), shall be refunded to the applicant.
- E** (9) When an application has been cancelled by the collector under sub-r (5) any sums paid by the applicant under sub-r (3) shall be forfeited to Government.

Service of Notices:

- F** 8 (1) The service of all notices or other processes issued under the provisions of the Ordinance or any rules made thereunder may be effected as follows —
- G** (a) by delivering to the notice or his authorised agent a copy of the notice or by sending a copy by registered post if the address of the notice or his agent be known and there be postal communication with such place;
- H** (b) when the notice cannot be found and has no agent empowered to accept service on his behalf service may be made on any adult member of the family of the notice who is residing with him; Explanation: A servant is not a member of the family within the meaning of this rule.
- I** (c) when the serving officer delivers a copy of the notice to the notice personally, or to his agent, or to an adult member of the family of the notice residing with him, he shall require as an acknowledgement of service endorsed on the original notice the signature or right thumb mark of the person to whom the copy is so delivered.
- (2) If the person to whom such copy is delivered or tendered is unwilling or unable to sign the acknowledgement, or if the serving officer is unable to find any proper person on whom to effect personal service, the Collector may order service to be effected by affixing a copy of the document to be

served in a conspicuous position upon the land (if any) which is affected, or by

- (a) affixing a copy thereof upon the house or place of business of the person to be served if such can be found within Sabah; or
- (b) affixing a copy thereof or a notice containing full particulars thereof at the mosque, market or other common place of resort in the town or village in which the person to be served usually resides or last resided.

(3) The Collector or Registrar may also, if he shall see fit, make an order for substituted service by advertisement in the Gazette or in any local newspaper.

(4) In cases where notices or other processes have to be served on illiterate natives or posted in districts which are mainly illiterate, the Collector or Settlement Officer shall employ such other methods of publishing the notice as may seem reasonable.

(5) In each of the above cases the serving officer or Collector shall enter on the back of the original of the document to be served a statement of the time, place and manner or method in which the service or publication was effected, or why service was not effected, and shall sign the same.

(6) The officer issuing the notice may require any serving officer to make oath or affirmation as to the truth of any such entry made by him.

(7) Every notice or other process issued under this Ordinance on behalf of any person other than a Collector or Registrar shall be served at the expense of that person.

(8) The expense of any notice or other process issued on behalf of the Collector or Registrar may be treated at the discretion of the Collector or Registrar as costs in the case, and may be made recoverable from any of the parties, if he shall so direct.

Now, in the instant case, there is no dispute that the defendants or their parents were in the said lands as early as 1976. And, in at least two of their correspondences with the office of ACLR Beluran, they indicated that they had already entered the said lands and were cultivating them (see DBD-2A and DBD-2E of the fourth defendant's affidavit — encl 23). Yet nothing was done by the ACLR in compliance with s 164 of the Ordinance. There was also no evidence showing that the office of the ACLR issued some form of protest against the occupation of the said lands by the defendants or their predecessors at that time. Meanwhile, it is not in dispute that there were land applications made for the said lands by the defendants or their predecessors as early as 1976 or thereabout. In fact, the last letter that came from the ACLR office was to inform the defendants or their predecessors that their applications would be brought to a meeting and that they would be informed of the result in due course. The defendants said that that was the last of what they knew of the fate of their/their predecessors' applications.

Based on the other correspondences exhibited in encl 23, it is also obvious that those responsible to handle the land applications did not do their work fairly. They sent the defendants/their predecessors on a wild goose chase. At the same time, there was no evidence that those

- A officers did their work according to the requirements of the Ordinance or the Rules. Nothing to indicate that there was a register of land applications kept as mandated by the Rules. There was also nothing to show when the land applications of the defendants or their predecessors were refused. PW1 could not come with any information. Indeed, he was hesitant to say much of what happened to the land applications of the defendants or their predecessors other than saying that it was difficult for him to say and that from the record, the applications were not approved. It is to be borne in mind that some of the applications were made as early as 1976, while the others were in 1980 at the latest. That is ancient when compared to the land applications of the vendors that were made only in 1987 for the second piece and 1990 for the rest of the pieces. These facts demand explanations from the office of the ACLR Beluran or the officers responsible to handle land applications at that time. If they did their work according to the call of service, I am certain that this present action would not have found itself into this court.

- D From the tenor of the letters written by the Natural Resources Department and the office of ACLR Beluran, either to the leaders of the defendants or their predecessors or to the other departments, there was positive indication that the applications would be processed. There was no caution given that approval was not guaranteed or that the presence of the defendants or their predecessors in the said lands would not be of any advantage in the process.

- E Another disturbing fact in this matter is that there appears to be a large area that was applied for by the group at that time. Yet there was nothing to indicate what happened to the rest of the area. This fact has a bearing to the status of the defendants or their predecessors in relation to the said lands. Were the rest approved and if so why were the said lands left out?

- F Accordingly for the forgoing, I find it difficult to say that these defendants or their predecessors were or are mere squatters simpliciter. They did not enter the said lands devoid of any reason. They did so with the view to apply for them and in fact did apply. And not only did they submit their land applications but also received replies from the relevant authorities indicating hope to them. As such, even based on the above accounts in relation to issue (1), I do not think it can be said that the matter before me is a plain and obvious case suitable for the invocation of O 89.

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- H Meanwhile there is no dispute that the defendants or their predecessors are natives of Sabah as defined. And if indeed their version as narrated above is correct and that they or their predecessors have been in the said lands since 1976, there is therefore definitely a question of whether they or their predecessors have acquired native customary rights over the same. No doubt the plaintiff argued that there was no objection received after the advertisement of the notices under s 13 of the Ordinance. But to my mind, mere performance of the ritual of putting up the notices would not rectify the shortcomings in the handling of the matter and should not cause the obliteration of all rights that might have been acquired by the defendants or their predecessors. On the contrary it could be said that the defendants or

their predecessors had the legitimate expectation that they would be issued with title deeds.

From the rule on service of notices, I think it was the intention of the framer that by all possible means the targets of the notices should be made aware of them. There is nothing in the Rules to say that it is sufficient if the notices are pasted in the notice board of the ACLR office. In this case, even PW1 acknowledged that it could be possible that the defendants or their predecessors did not know of the notices issued under s 13 of the Ordinance in relation to the applications of the vendors. Hence, this is another issue that demands an explanation. If indeed the defendants were not aware of the notices then there should be no reason for them to lose their right to claim for native customary rights over the said lands. To allow that to happen would be a gross violation of the cardinal principle of natural justice.

As regards the reports that were prepared by the land inspector, that should be another reason to say that indeed it was likely that the defendants knew nothing of the pending applications by the vendors. It is quite obvious that the land inspector failed to do his job as required since he reported that the said lands were cultivated at that time by the vendors. If he had gone to the area as expected of him, he would have found the truth out. One thing positive that transpired from the reports is that it confirmed that the said lands were already cultivated at that time. And there was no claim from the plaintiff that someone else other than the defendants or their predecessors were the ones that did the clearing of the area. In fact, there was no denial to the assertion of the defendants that it was them or their predecessors that did the cultivation.

The foregoing facts are also relevant on the issue of whether or not native customary rights have been acquired by the defendants or their predecessors in respect of the said lands.

There is no doubt that the plaintiff is now the registered owner of the said lands after purchasing them from the vendors. But at the same time, there is no averment from him that he bought the same in good faith and in complete ignorance of the conditions therein. It is almost inconceivable that the plaintiff would not want to know at least the location and condition of the said lands before purchasing them. And it is important to note that under the Ordinance, there is no provision for indefeasibility of title unlike the National Land Code applicable in Peninsula Malaysia or the Sarawak Land Code (see *Borneo Housing Mortgage Finance Bhd v Times Engineering Bhd* [1996] 2 MLJ 12). Hence, if the approvals of the land applications by the vendors were secured contrary to law in that the procedure and requirements were not properly complied with, can it not be said that the alienation was not in order? Or should the stand be taken that once a title deed has been issued nothing could be done to undo any error? These are yet indicators that the issues involved in this case are not without merits but warrant further deliberation after a full trial. Further, on the assumption that the approval was given contrary to law, would mere registration of ownership derive a good title that could be passed on? If not then the plaintiff might have received nothing from the vendors. These of course are

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A issues demanding answers that can only be obtained after a full trial. In fact in the case of *Norimah* the Court of Appeal did not dismiss the claim of the occupants of the land despite the fact that the applicant was already the registered owner. And the National Land Code in that case governed the subject land where there is a provision for indefeasibility of title.

B Thus, from the foregoing it is clear that on issue (1) itself, there are issues or sub-issues requiring further enquiry and hence it is difficult to say that this is a plain and simple case which justifies a summary judgment under O 89. In *Salim bin Ismail & Lain-Lain lwn Lebbey Sdn Bhd (No 2)* [1997] 2 MLJ 4, his Lordship Ahmad Fairuz JCA (as he then was) adopted what was said in the *Supreme Court Practice* 1991 Vol 1 at p 1576 which, inter alia, states as follows:

C On the other hand, like the default and summary procedures under O 13 and O 14, this order would normally apply only in virtually uncontested cases or in clear cases 'where there is no issue or question to try, ie, where there is no reasonable doubt as to the claim of the plaintiff to recover possession of the land or as to wrongful occupation of the land without licence or consent and without any right, title or interest thereto. Where the existence of a serious dispute is apparent to a plaintiff, he should not use this procedure. If he does, the action may be struck out (*Henderson v Law* (1984) 17 HLR 237, CA).

(b) Issue (2)

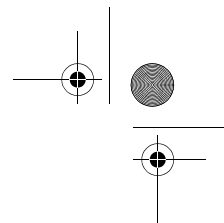
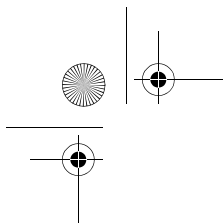
E In the event that I am wrong in my conclusion as to issue (1) above, then for the same reasons as discussed herein, I do not think it is far fetched to say that by remaining silent to the obvious announcement by the defendants or their predecessors that they were entering the said lands, entitled the relevant authorities to say that at all material times they did not know of the entry. Their silence or passive response would have given the effect of tacit approval for the entry. As such, it would be difficult to say that the defendants were and are trespassers, and hence squatters simpliciter. Their continuous presence on the said lands unimpeded would have clothed them the sense of being allowed or licensed to be there. And such position would have been strengthened in view of their land applications and the responses that came from those responsible on land matters in Sabah. Surely therefore this is another point that is highly arguable and should not be cast aside in favour of a summary order as prayed for by the plaintiff in this case.

(c) Issue (3)

H In view of the conclusions above, I do not intend to deal with this last point in any great detail. Suffice it to say that on reading the provision of O 89 in relation to the other provisions of the Rules and based on decided cases, I am inclined to agree that the alleged shortcomings on the part of the plaintiff when making this application should not be taken as fatal so as to warrant dismissal of the same *in limine*.

I *Conclusion*

As I agree that there are triable issues involved in this case, it is not therefore case suitable for summary order as prayed for by the plaintiff. I would



A therefore dismiss this application with costs to the defendants to be taxed unless agreed.

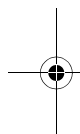
Application dismissed.

Reported by Lim Lee Na

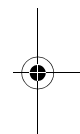
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